

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:)

WENDY FOMBY)

WENDY FOMBY PROPERTY)

DADEVILLE, TALLAPOOSA COUNTY, ALABAMA)

UNPERMITTED SITE, FACILITY ID #58234.1)

Consent Order No. 18-xxx-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter “the Department”) and Wendy Fomby (hereinafter “the Operator”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17, as amended, the Alabama Water Pollution Control Act (hereinafter “AWPCA”), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

STIPULATIONS

1. The Operator operates a Noncoal Mining Site known as the Wendy Fomby Property (hereinafter “Facility”) located at the intersection of County Road 34 and Roberts Drive in Dadeville, Tallapoosa County, Alabama.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-17, as amended.

3. Pursuant to § 22-22A-4(n) Ala. Code (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1388. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA.

4. The following references and acronyms are used in this Order and, when used, shall have the meaning of the name or title referenced below:

BMPs	Best Management Practices
CBMPP	Construction Best Management Practices Plan
NOI	Notice of Intent
NOR	Notice of Registration

NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional

5. The Operator consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

6. The Department has agreed to the terms of the Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the alleged violations. The Department has determined that the terms contemplated in the Consent Order are in the best interests of the citizens of Alabama.

DEPARTMENT'S CONTENTIONS

7. Pursuant to ADEM Admin. Code r. 335-6-12-.11(1), operation of sites that have not submitted a complete and correct NOR or application requesting coverage under a valid NPDES general permit is prohibited.

8. During inspections of the Facility on June 14, 2017, December 7, 2017, and January 19, 2018, the Department documented that the Operator was conducting regulated disturbance activities without NPDES permit coverage in violation of ADEM Admin. Code r. 335-6-12-.11(1).

9. ADEM Admin. Code r. 335-6-12-.21(1) provides that "[c]ommencement and/or continuation of NPDES construction activity is prohibited . . . unless effective BMPs are implemented and maintained in accordance with a CBMPP prepared/certified by a QCP as adequate to meet the requirements of this chapter and applicable requirements of ADEM Administrative Code division 335-6." The CBMPP and any BMPs shall meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, and the Alabama Handbook For Erosion Control, Sediment Control, And Stormwater Management On Construction Sites And Urban Areas published by the Alabama Soil and Water Conservation Committee (hereinafter the "Alabama Handbook").

10. During the inspections of the Facility on June 14, 2017, December 7, 2017, and January 19, 2018, the Department documented that the Operator had not properly implemented and regularly maintained effective BMPs, in violation of ADEM Admin. Code r. 335-6-12-.21(1).

11. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10), the Operator is required to

promptly take all reasonable steps to determine the nature and impact of non-complying discharges, and to remove, to the maximum extent practical, pollutants deposited offsite or in any waterbody.

12. During the inspections of the Facility on June 14, 2017, December 7, 2017, and January 19, 2018, the Department documented pollutants deposited offsite. The Operator failed to properly address offsite sediment, in violation of ADEM Admin. Code r. 335-6-12-.35(10).

13. On October 10, 2017, the Department issued an NOV to the Operator as a result of the June 14, 2017, inspection. The NOV notified the Operator of violations documented at the Facility and required the Operator to submit to the Department, within thirty days of receipt of the NOV, a complete application for an individual NPDES permit. The Operator received the NOV on October 17, 2017. The Department received the Operator's NOI on November 30, 2017.

14. The Department neither admits nor denies the Operator's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

15. Pursuant to Ala. Code § 22-22A-5(18)c., as amended, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent, and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty (summarized in Attachment 1), the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS AND BASE PENALTY: Based on the information available to the Department, violations of ADEM Admin. Code div. 335-6 and the

AWPCA were noted. The Department considered the general nature of each violation, the violations' effects, if any, on the receiving waters, and any available evidence of irreparable harm to the environment or threat to the public. Violations consisted of: failure to obtain permit coverage; failure to properly implement and maintain BMPs; failure to properly address offsite sediment. In arriving at the civil penalty, the Department considered the general nature of each violation and any available evidence of irreparable harm to the environment or threat to the public.

B. THE STANDARD OF CARE: The Department noted that failure to obtain permit coverage prior to conducting regulated activities and failure to timely submit the permit application in response to the NOV were non-technical and easily avoidable violations.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has considered that the Operator may have avoided and/or delayed certain costs associated with obtaining valid NPDES permit coverage and proper implementation and maintenance of BMPs but has not enhanced the penalty due to the minimal nature of this possible benefit.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Operator to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is unaware of violations previous to those addressed herein.

F. THE ABILITY TO PAY: The Department has received evidence and/or information that indicates that the Operator does not have an ability to pay the entire civil penalty. The Department has reduced the penalty amount accordingly.

G. This Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

H. The civil penalty is summarized in Attachment 1.

OPERATOR'S CONTENTIONS

16. The Operator neither admits nor denies the Department's contentions. The Operator consents to abide by the terms of this Consent Order.

ORDER

THEREFORE, the Operator, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, as well as the need for timely and effective enforcement, and the Department believes that the penalty assessed below and the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Operator (hereinafter collectively "Parties") agree to enter into this CONSENT ORDER with the following terms and conditions:

A. The Operator agrees to pay the Department a civil penalty in the amount of \$3,600.00 payable in twelve monthly installments according to the following table:

Payment Number	Payment Amount
1	\$300.00
2	\$300.00
3	\$300.00
4	\$300.00
5	\$300.00
6	\$300.00
7	\$300.00
8	\$300.00
9	\$300.00
10	\$300.00
11	\$300.00
12	\$300.00

The first payment shall be due on the first day of the month following the effective date of this Order, with each subsequent payment due the first day of each month thereafter. Failure to pay the civil penalty in accordance with the specified payment schedule may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the entire civil penalty due.

B. All penalties due pursuant to this Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. Immediately upon the effective date of this Order, the Operator shall cease all mining and related activity at the Facility other than BMP implementation / maintenance, and sediment removal / remediation. Mining and related activity other than BMP implementation / maintenance, and sediment removal / remediation is not authorized to resume until approved in writing by the Department.

D. Immediately upon the effective date of this Order, the Operator shall take action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Facility and prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State.

E. Within **thirty days** of the effective date of this Order, the Operator shall submit to the Department a certification signed by a QCP that effective BMPs that meet or exceed the technical standards outlined in the Alabama Handbook, the site BMP Plan, and ADEM Admin. Code chap. 335-6-12 have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin Code chap. 335-6-12 has been achieved at the Facility, offsite conveyances, and affected State waters.

F. This Consent Order shall apply to and be binding upon both Parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the Party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the Party represented, and to legally bind such Party.

G. Subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

H. The Operator is not relieved from any liability if it fails to comply with any provision of this Consent Order.

I. For purposes of this Consent Order only, the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. In any action brought by the Department to compel compliance with the terms of this Agreement, the Operator shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Operator) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline shall be accompanied by the reasons (including documentation) for each extension and the proposed extension time. The Operator shall submit this information so that it is received by the Department a minimum of **ten working days** prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

J. The sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in other orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate. The Operator shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent

Order if such future orders, litigation, or other enforcement action addresses new matters not raised in this Consent Order.

K. This Consent Order shall be considered final and effective immediately upon signature of all Parties. This Consent Order shall not be appealable, and the Operator does hereby waive any hearing on the terms and conditions of same.

L. This Consent Order shall not affect the Operator's obligation to comply with any Federal, State, or local laws or regulations.

M. Final approval and entry into this Consent Order are subject to the requirements that the Department provide notice of proposed orders to the public, and that the public have at least thirty days within which to comment on the proposed Consent Order.

N. Should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

O. Any modification of this Consent Order shall be agreed to in writing and signed by both Parties.

P. Except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Operator of its obligation to comply in the future with any permit.

Executed in duplicate, with each part being an original.

Wendy Fomby

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

EXECUTED AND ISSUED:

By: Wendy C. Fomby

By: _____

Its: WCF

Its: _____

Date: 6-1-2018

Date: _____

Attachment 1

**Wendy Fomby - Wendy Fomby Property
Tallapoosa County
Unpermitted**

Violation*	Number of Violations*	(A)	(B)	(C)
		Seriousness of Violation*	Standard of Care*	History of Previous Violations*
Failure to implement/maintain adequate BMPs	1	\$ 2,500.00	\$ 1,250.00	
Operating without a Permit/Appropriate Permit	1	\$ 3,000.00	\$ 1,500.00	
Discharge of sediment/offsite sediment	1	\$ 3,000.00	\$ 1,500.00	\$ -
		\$ -	\$ -	

\$8,500.00	\$4,250.00	\$0.00
Total (A)	Total (B)	Total (C)
Base Penalty Total		\$12,750.00
[Total (A) + Total (B) + Total (C)]		
Mitigating Factors (-)		
Economic Benefit (+)		
Ability to Pay (-)		
Other Factors (+/-)		
INITIAL PENALTY		\$12,750.00
Total Adjustments (+/-)		-\$9,150.00
FINAL PENALTY		\$3,600.00

Additional Adjustments due to negotiations, receipt of additional information, or public comment

Mitigating Factors (-)	
Economic Benefit (+)	
Ability to Pay (-)	-\$4,389.00
Other Factors (+/-)	-\$4,761.00
Total Adjustments (+/-)	-\$9,150.00

Footnotes

*See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors